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In The
Supreme Court of the United States

October Term, 1998

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

Appellants,

vs.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,

Appellees.

*On Appeal from the United States District Court
for the District of Columbia*

**BRIEF OF AMICUS CURIAE COUNTY OF
WESTCHESTER IN SUPPORT OF APPELLANTS**

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INTEREST OF AMICUS CURIAE

This brief is submitted by the Westchester County Attorney on behalf of Westchester County, located in the State of New York, pursuant to Rule 37(4) of the Rules of the Supreme Court of the United States.

As a local municipality in the State of New York, Westchester County is required by law to utilize the federal decennial census for the purposes of establishing its legislative districts. By prohibiting the Census Bureau of the United States Department of Commerce (Bureau) from utilizing statistical sampling to obtain the most accurate enumeration possible for the 2000 decennial census, Westchester County will be compelled to inappropriately redistrict its legislative branch of government to the detriment of renters, children, racial and ethnic minorities as well as the entire Westchester County population as a whole. In light of this significant impact, Westchester County believes it to be vital that it express its views to this Honorable Court.

SUMMARY OF THE ARGUMENT

Westchester County respectfully submits that the decision of the United States District Court (Lamberth, J) improperly interpreted 13 U.S.C. sections 141 and 195 by prohibiting the use of statistical sampling for a census for the purpose of congressional apportionment, while acknowledging the use of statistical sampling for the purpose of federal funding.

The primary purpose of the census is to provide accurate information upon which to base legislative districting. The census' central objective is to achieve the most accurate enumeration possible in this technological era. By prohibiting the Bureau from utilizing statistical sampling as part of its plan for the 2000 decennial census, the Court has denied the Bureau the use of an important technological tool and compelled Westchester County to inappropriately redistrict its legislative branch of government to the detriment of renters, children, racial and ethnic minorities as well as the entire Westchester County population as a whole. This will defeat the very purpose for which the census provisions of the Constitution were enacted.

Consequently, the decision of the United States District Court should be reversed in its entirety.

ARGUMENT

The District Court's determination to prohibit the use of statistical sampling in the federal census for the year 2000 has effectively destroyed the equality of votes, especially when utilized by the local legislative branches of government such as Westchester County.

The United States census has undercounted Americans for over 200 years. However, a modern phenomenon, known as differential undercounting has only recently emerged. Differential undercounting is the term used to describe the difference in **the undercount** of one subgroup of the population, (*i.e.*, African-Americans) compared to another subgroup, (*i.e.*, non-African-Americans). The last several decennial censuses have undercounted certain groups - including renters, children and racial and ethnic minorities - at much higher rates than other segments of the population. Specifically, the Census Bureau indicated that approximately 4.4% of African-Americans, 5.0% of Hispanics, and 12.2% of American Indians living on reservations were not accounted for in the 1990 census, but only 0.7% of Non-Hispanic Whites were left unaccounted.

This differential undercount in the United States decennial census poses serious ramifications for local governments including, but not limited to, the composition of such local governments. For example, Westchester County, New York, has a population of approximately 900,000

individuals contained in an area of approximately 360 square miles, and divided into urban, suburban and rural areas. In addition, the towns, villages and cities¹ located within Westchester County vary in population make-up. In essence, Westchester County can be considered to be a microcosm of the entire United States of America.

The legislative branch of County government is divided into seventeen (17) legislative districts and is required, by law, to amend its districts in accordance with the United States decennial census. The long-standing inaccuracies from the federal census have a significant impact on the adequacy of representation received at the local levels.

In the past, Westchester County, and other similarly situated local governments within the State of New York, in recognition of the known inaccuracies in the United States decennial census, have attempted to supplement the federal census with information acquired locally. *See generally, Honig v. Rensselaer County Legislature*, 37 A.D.2d 658, 322 N.Y.S.2d 332 (3d Dep't 1971) *aff'd* 29 N.Y.2d 630, 324 N.Y.S.2d 417, 273 N.E.2d 143 (1971); *Seaman v. Fedourich*, 16 N.Y.2d 94, 262 N.Y.S.2d 444, 209 N.E.2d 778 (1965);

¹ The following cities, towns, and villages are all located within the County of Westchester: Peekskill, Rye, Mount Vernon, White Plains, Yonkers, Mount Kisco, New Rochelle, Bedford, Eastchester, Mamoroneck, New Castle, North Salem, Pelham, Pound Ridge, Yorktown, Cortlandt, Harrison, Scarsdale, Briarcliff Manor, Bronxville, Buchanan, Dobbs Ferry, Hastings-on-Hudson, Irvington, Larchmont, Port Chester, Tarrytown, and Tuckahoe.

Chonigman v. County of Westchester, 192 A.D.2d 499, 595 N.Y.S.2d 810 (2d Dep't 1993); *Town of Scarsdale v. County of Westchester*, 192 A.D.2d 517, 595 N.Y.S.2d 811 (2d Dep't 1993); *Thayer v. Garraghan*, 28 A.D.2d 584, 279 N.Y.S.2d 441 (3d Dep't 1967). The goal of supplementing the federal census was to achieve a more accurate count of the total population and its composition within each individual County so as to assure adequate representation of all individuals who reside within the County.

Notwithstanding the attempts of Westchester County to rectify the inaccuracies that the federal census imposed at the local levels, the New York courts, including New York State Court of Appeals, determined that counties, and other governmental entities, are bound to utilize the findings of the federal census, and may not devise their "own method of calculating population as a basis for deriving a districting plan for its elective lawmaking body". *Seaman v. Fedourich*, 16 N.Y.2d 94, 262 N.Y.S.2d 444, 209 N.E.2d 778 (1965); *Chonigman v. County of Westchester*, 192 A.D.2d 499, 595 N.Y.S.2d 810 (2d Dep't 1993); *Town of Scarsdale v. County of Westchester*, 192 A.D.2d 517, 595 N.Y.S.2d 811 (2d Dep't 1993). The New York State Court of Appeals in *Seaman v. Fedourich* specifically interpreted the New York State Constitution as mandating the utilization of the "latest Federal census [with respect to] ... the number of inhabitants in the state or any part thereof for the purposes of ... legislative

apportionment". *Seaman v. Fedourich*, 16 N.Y.2d at 104, 262 N.Y.S.2d at 451; *see also* N.Y. Const. Art. III, section 4. The fact that the method of calculating the population developed by the local municipalities more accurately reflected the composition of its populace was irrelevant since it was more important to rely upon the federal decennial census to "assure periodic, impartial population data on the basis of which an apportionment or districting plan may be initially developed and thereafter regularly revised." *Seaman* at 452.

In light of the mandate by New York State law to utilize the latest Federal census for the purposes of legislative apportionment, Westchester County was pleased that the Census Bureau, at long last, planned to mitigate both the net undercounting of the total population and differential undercounting in the 2000 decennial census through the use of sophisticated statistical sampling techniques (*i.e.* using information derived from a portion of a population to infer information on the population as a whole) approved by the National Academy of Sciences and other prominent, objective authorities. Specifically, the Census Bureau's plan for the 2000 census proposed to utilize statistical sampling in three different phases: (1) the use of sampling in the Postal Vacancy Check program to verify the United States Postal Service's determination that certain housing units are vacant and to correct for anticipated errors in this designation; (2) the use of sampling techniques in the Nonresponse Follow-up phase of

the census; and (3) the use of a post-census survey, referred to as Integrated Coverage Measurement.

Westchester County concurs with the Census Bureau's assessment that statistical sampling is scientifically based; improves accuracy; eliminates the traditional undercount of children, renters and minorities; and saves money. In other words, the use of statistical sampling will result in a far more accurate and cost-effective census. In addition, a more accurate census will ameliorate the current problems previously experienced by the local governments, such as Westchester County, with respect to its own redistricting and will ultimately result in providing "truer representation" for the population as a whole.

However, the Court below has held that the use of statistical sampling to determine the population for purposes of apportioning representatives in Congress among the states violates the Census Act, 13 U.S.C. section 1 et seq. The District Court permanently enjoined the Department of Commerce and the Census Bureau from using statistical sampling, including its program for Nonresponse Follow-up and Integrated Coverage Measurement, to determine the population for the purposes of congressional apportionment. The District Court's rationale was primarily based upon its interpretation that 13 U.S.C. sections 141 and 195, when read together, do not authorize the use of statistical sampling with respect to the congressional apportionment.

This ruling by the United States District Court not only impacts the United States congressional apportionment but, in light of the laws of the State of New York, also directly affects the ability of Westchester County to appropriately apportion its legislative districts as well.

Currently, the use of statistics is widespread and the importance of the information that they provide should not be underestimated. Statistics are utilized in a variety of fields and professions, including but not limited to medicine, sports, government, history, sciences, business, education and economics. Statistics have been used to determine and/or discover a variety of issues in an effort to appropriately identify, address and improve upon those issues. For example, statistics have been utilized by the governments, businesses and even the judiciary, to evaluate productivity, efficiency and cost-effectiveness. Statistical results have been used by these entities, and others, for reorganization of resources and personnel which ultimately results in more efficient operations. Even the United States Congress has recognized the value of the use of statistics as evidenced by the enactment of 13 U.S.C. sections 141, 193 and 195. Each of these sections authorizes the use of statistics, including statistical sampling, in conjunction with the taking of a census.

However, the United States District Court's decision (Lamberth, J.) stated that because Congress appears to have excluded the use of statistical sampling with respect to the

apportionment of Congress in section 195; and did not specifically authorize the use of statistical sampling with respect to the apportionment of Congress in any other provision which authorizes the use of statistical sampling, the Census Bureau was prohibited from utilizing statistical sampling in connection with the year 2000 census.

According to the United States District Court, "[t]he interpretation of two provisions of the Census Act, section 141(a) and 195, is ultimately determinative as to whether statistical adjustment to the initial headcount is permissible or proscribed." 1998 U.S. Dist. LEXSEE 13133 at pg. 26. According to the District Court, despite the fact that the Secretary of Commerce is authorized to use statistical sampling, if the Secretary deems it appropriate, the Secretary is not specifically authorized to use of sampling procedures in connection with the apportionment of Representatives. Consequently, the District Court held that the Census Bureau is prohibited from utilizing statistical sampling for the year 2000 census.

A census is supposed to be an enumeration of a population. See generally *Rochester v. County of Monroe*, 93 A.D.2d 625, 462 N.Y.S.2d 939 (4th Dep't 1983). The term "census" does not have a separate and distinct meaning when utilized in connection with congressional reapportionment or, in the case of Westchester County, with legislative redistricting. However, the District Court has interpreted the

term "census" according to its ultimate use as opposed to its primary purpose. In other words, there are two separate ways in which to interpret "census" depending upon whether it is to be used for redistricting or some other purpose. What is important is the accuracy of the census and not the purpose for which the census is used.

Furthermore, any justification for a distinction in the definition of the term "census" insofar as it relates to congressional apportionment is clearly outweighed by the disparate impact that ultimately results from the differential undercounting of the population. Moreover, the inadequacies that the undercount and differential undercounting cause at the federal level are accentuated at the local governmental levels, such as Westchester County.

This Honorable Court has already commented on the negative impact which results at the local levels from the federal census:

- Approximately one-third of the Justice Department's objections have been to redistrictings at the state, county and city levels. (S. Hearings 539-540, 581-582). This past experience ought not be ignored in terms of assessing the future need for the Act. It is ironic that the Supreme Court's one man-one vote" ruling [*Reynolds v. Sims*, 377 U.S. 533 (1964)] has created opportunities to disfranchise minority voters...

McDaniel v. Sanchez, 452 U.S. 130, 101 S.Ct. 2224, 68 L.Ed.2d 724 (1981).

Here, the Census Bureau, in accordance with its authority to utilize statistical sampling pursuant to 13 U.S.C. sections 141, 193, and 195, has attempted to minimize the inaccuracies which result in undercounting the American population. The more accurate the census, the more accurate the representation of the population as a whole. As stated in *Gaffney v. Cummings*, 412 U.S. 735, 744, 93 S.Ct. 2321, 2326-7, 37 L.Ed.2d 298 (1973),

Substantial equality of population among the various districts [is required], so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state... In other words, an individual's right to vote ... is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared to the votes of citizens living in other parts of the state...(citations omitted).

In the instant case, the failure to utilize statistical sampling in the year 2000 census will result in substantial population variations. The District Court's determination to prohibit the use of statistical sampling in the federal census for the year 2000 has effectively destroyed the equality of votes, especially when utilized by the local legislative branches of government such as Westchester County.

It is imperative that this Honorable Court dispense with the unwarranted distinctions between a census for one purpose versus another purpose and uphold the importance of

achieving the most accurate census possible at this time. Only then, will the entire American population be adequately represented at the local, state and federal levels of government in accordance with the dictates to the Constitution of the United States of America.

CONCLUSION

For the foregoing reasons, the Order and Judgment of the United States District Court for the District of Columbia (Lamberth, U.S.D.J.) dated and entered on August 24, 1998, should be reversed in its entirety thereby enabling the Census Bureau to utilize statistical sampling as part of its plan for the 2000 decennial census.

Date: White Plains, New York
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